Petition

81-1385

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PEPSI-COLA DISTRIBUTING COMPANY
OF KNOXVILLE, TENNESSEE, INC.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

When, by contract language that is admittedly plain and unambiguous, a union clearly and unmistakably waives its statutory right to bargain with a company, must not administrative agencies and courts give full force and effect to that waiver?

LISTING OF ALL THE PARTIES IN THE CASE

The Petitioner in the case and the Respondent below is Pepsi-Cola Distributing Company of Knoxville, Tennessee, Inc. The Petitioner in the Court of Appeals is the National Labor Relations Board. The Charging Party, in whose behalf the Board prosecuted the case, is Teamsters Local Union 519, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

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Pepsi-Cola Distributing Company of Knoxville, Tennessee, Inc. v. National Labor Relations Board, 646 F.2d 1173 (6th Cir. 1981) . . 1

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OPINIONS OF THE COURT AND ADMINISTRATIVE AGENCY BELOW

The opinion of the United States Court of Appeals is published at 646 F.2d 1173 (6th Cir. 1981). The Court's Order denying the Company's Petition for Rehearing is not published. Both are printed in a Separate Appendix to this Petition.

The opinion of the National Labor Relations Board (including the decision of the Administrative Law Judge) is published at 241 N.L.R.B. 869 (1979) and is also printed in the Separate Appendix to this Petition.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals, embodying its decision and judgment, is dated May 1, 1981, and was entered on that date.

Thereafter, the Petitioner timely filed with the Court of Appeals a Petition for Rehearing incorporating a suggestion that the appeal be reheard en banc. The Court of Appeals denied that Petition on October 21, 1981. The filing of this Petition for Certiorari is within ninety days from the date of such denial of rehearing. Bowman v. Loperena, 311 U.S. 262, 266 (1940).

Jurisdiction to review the decision of the Court of Appeals, by writ of certiorari, is conferred on this Court by the provisions of 28 U.S.C. §1254(1).

THE STATUTORY PROVISIONS INVOLVED

> "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively

with the representatives of his employees. . . ."

Section 8(a)(5) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §158(a)(5)

STATEMENT OF THE CASE

On February 1, 1977, the Petitioner herein, Pepsi-Cola Distributing Company of Knoxville, Tennessee, Inc.[1], purchased Hartman Beverage Company.[2] Some two months earlier Hartman had concluded negotiations with Teamsters Local Union 519, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America[3], for a collective bargaining

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[1] Hereinafter referred to as "Pepsi-Cola" or the "Company".

[2] Hereinafter "Hartman".

[3] Hereinafter the "Union".

contract between them to remain in effect until November 26, 1977.

In addition to numerous understandings and agreements on such things as wages, arbitration and seniority, Hartman and the Union agreed upon a "maintenance of standards" clause in which they listed all past practices and existing conditions that were to remain in effect for the duration of the Agreement. These were: — A carton of free drinks weekly for each employee, the use and application of profits from employee vending machines, employee parking areas, salary advances and employee payroll deductions.

For several years Hartman had paid an annual Christmas bonus and, while this bonus was briefly discussed in negotiations, it was neither listed in

the maintenance of standards clause nor mentioned anywhere else in the contract. However, as to the unmentioned bonus and any other matters that were not included in the express terms of the contract, the parties agreed explicitly that:

> "Section 2. The Employer and the Union agree that all matters desired by either party have been presented, discussed and incorporated herein or rejected. Accordingly, it is agreed that for the life of this Agreement each party voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter, whether or not referred to in this Agreement.
>
> . . .
>
> "Section 4. . . . All matters deemed by the parties to be proper subjects for bargaining . . . are set forth in [this] Agreement."

When Pepsi-Cola took over operation of Hartman, Company officials, though

unaware of Hartman's past practice as to the Christmas bonus, met with the employees and assured them that the Company would pay them according to the terms of the union contract as written.

In December of 1977, the Company's route salesmen inquired whether they would receive a Christmas bonus and were told they would not. Rather, Pepsi-Cola reiterated that it would pay the route salesmen only in accordance with the terms and conditions of the contract.

The Union thereupon filed "unfair labor practice" charges claiming that the Company had violated Section 8(a)(5) of the National Labor Relations Act because it had not bargained with the Union concerning discontinuance of the bonuses.

Following a trial of the case, an Administrative Law Judge ruled that the conspicuous absence of any mention of the bonuses under the maintenance of standards clause, coupled with the clear and unambiguous language of waiver in the contract, compelled a finding that the Company was under no obligation to pay the bonuses or to bargain over their discontinuance.

Upon exceptions to this decision filed by the Union, a three-member panel of the National Labor Relations Board tacitly acknowledged that the Union's waiver of its right to bargain was stated in plain and unambiguous terms. The panel refused, however, to enforce the contract as written by the parties. The Board resorted instead to "facts and circumstances

surrounding the making of the contract" to determine whether, in the panel's view, the parties had intended to contract as the document said they did.

Focusing solely upon an alleged[1] statement made by the president of the predecessor company in the 1976 negotiations to the effect that the bonuses "had been given for several years" and were "nice to get at Christmastime", the Board "inferred" that Hartman and the Union had agreed the bonuses would continue. On that inference the Board piled the additional inference that the Union had

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[1] Actually there was a conflict in the evidence on this point and the Administrative Law Judge specifically declined to resolve the variance in testimony. See Appendix to this Petition, pp. 70-71.

"not clearly and unmistakably waived its right to be consulted" about the discontinuance of the bonuses "despite the inclusion of the [waiver language in the contract]". Otherwise stated, by piling inference upon inference, the Board concluded that the parties did not mean to say what they actually did say. It ordered the Company to pay the bonuses retroactively and to bargain with the Union regarding the subject.

Pursuant to Section 10(e) of the Labor Management Relations Act[1], the Board thereafter made application to the United States Court of Appeals for the Sixth Circuit for enforcement of its

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[1] 29 U.S.C. §160(e).

Order. After noting that the case was "not beyond dispute" and after acknowledging that the United States Court of Appeals for the Fourth Circuit had reached an opposite result in a similar case, the majority of a divided panel of the Court agreed with the Board that there had been no waiver by the Union.

In reaching this conclusion, the panel majority focused its attention on the alleged statements by Hartman's president and on the character of the bonuses. Finding the bonuses to be a part of the employees' wage package and a mandatory subject of bargaining, the majority concluded there had been no waiver. As the dissent cogently noted, however, the majority totally ignored —

as had the Board — the clear and unambiguous language of waiver in the contract.

The Company's subsequent Petition for Rehearing was denied.

REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI

It is respectfully submitted that the Court of Appeals' decision indistinguishably conflicts with prior decisions of the United States Courts of Appeal for the Fourth and Tenth Circuits.

ARGUMENT

In all material respects, the provisions of the waiver clause nullified by the Court of Appeals below are identical to waiver provisions previously enforced by the Courts of Appeal for the Fourth and Tenth Circuits.

As noted above, the contract of the parties in the case at bar provided that:

> "The Employer and the Union agree that all matters desired by either party have been presented, discussed and incorporated herein or rejected. Accordingly, it is agreed that for the life of this Agreement each party voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter, whether or not referred to in this Agreement" (Emphasis supplied).

In National Labor Relations Board v. Southern Materials Company, 447 F.2d 15 (4th Cir. 1971), the contract provided in almost identical terms that:

> "The Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject matter referred to or covered in this

> Agreement, or with respect to any subject matter not specifically referred to or covered in this Agreement" (Emphasis supplied).
>
> 447 F.2d at 17

In National Labor Relations Board v. Auto Crane Company, 536 F.2d 310 (10th Cir. 1976), the collective bargaining contract contained the following language:

> " . . . the Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waive the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered in this Agreement, or with respect to any matter or subject not specifically referred to or covered in this Agreement" . . . (Emphasis supplied).
>
> 536 F.2d at 312

In the instant case, the Court below approved a ruling by the Board that,

regardless of the contract language agreed upon, the question of "whether there has been a clear relinquishment of the right is to be decided on the facts and circumstances surrounding the making of the contract". Accordingly, based upon the nature of the bonus and oral statements allegedly made by management officials, a majority of the panel below sustained the Board's ruling that the Union did not mean to waive its right to bargain.

In Southern Materials, however, as the Court noted, management had also orally assured the Union that employees would not lose any benefits they currently enjoyed. But that Court ruled precisely contrary to the ruling of the Court in this case; that is, the Fourth Circuit

held that the clear and unmistakable language of the contract prevailed regardless of the facts and circumstances surrounding its making. Notwithstanding the striking similarity of the language in all three cases, the Fourth and Tenth Circuits found a clear and unmistakable waiver of the union's right to bargain, yet the Sixth Circuit found no waiver.

Accordingly, the decision of the Court of Appeals below would have a devastating effect upon existing and future labor contracts, because labor and management must necessarily re-examine their bargaining positions and contractual rights and responsibilities, depending upon which Federal Court might

be expected to enforce their agreement. Employers and unions frequently negotiate single collective bargaining agreements affecting several facilities in difference states and many contain waiver language similar to that in the instant case. Such contracts would have one meaning in the Sixth Circuit and in any other circuits which may adopt its holding, and the opposite meaning in the Fourth and Tenth Circuits and circuits which follow their rulings.

It is vitally important to national labor policy and to the stability of labor management relations that standard, similar labor agreement

language be consistently interpreted by the Board and the courts.

Respectfully submitted,

J. W. ALEXANDER, JR.

Attorney for the Petitioner

Appendix

81-1385

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CLERK

NO.

IN THE

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OCTOBER TERM, 1981

PEPSI-COLA DISTRIBUTING COMPANY OF KNOXVILLE, TENNESSEE, INC.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

SEPARATE APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. 79-1314

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	
vs.	ORDER
PEPSI-COLA DISTRIBUTING COMPANY OF KNOXVILLE, TENNESSEE, INC., Respondent.	

Before: EDWARDS, Chief Judge, BROWN, Circuit Judge, and BATTISTI,* District Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this court having moved for rehearing en banc

*Honorable Frank J. Battisti, Chief Judge, United States District Court for the Northern District of Ohio, sitting by designation.

and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's opinion,

Now, therefore, the motion for rehearing is hereby denied.

Entered by order of the Court

s/ John P. Hehman
Clerk

No. 79-1314
UNITED STATES COURT OF APPEALS
For The Sixth Circuit

National Labor Relations Board,
Petitioner,

v.

Pepsi-Cola Distributing Company
of Knoxville, Tennessee, Inc.,
Respondent.

On Application for Enforcement
of an Order of the
National Labor Relations Board

Decided and Filed May 1, 1981.

Before: Edwards, Chief Judge, Brown, Circuit Judge, and Battisti,* District Judge.

Edwards, Chief Judge, delivered the opinion of the Court in which Battisti, District Judge, joined. Brown, Circuit Judge, (pp. 6-8) filed a separate dissenting opinion.

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* Honorable Frank J. Battisti, Chief Judge, United States District Court for the Northern District of Ohio, sitting by designation.

Edwards, Chief Judge. The National Labor Relations Board petitions for enforcement of its order entered April 13, 1979, reported at 241 NLRB No. 136.

Pepsi-Cola Distributing Company of Knoxville, Tennessee, Inc. purchased a distributorship previously owned and operated by Hartman Beverage Company. For a considerable number of years, Hartman had paid its route salesmen a year-end bonus calculated at one cent per case sold by individual route salesmen during the previous year. The bonus was paid annually approaching the Christmas season and had been so paid before the union, Teamsters Local Union No. 519, negotiated a one year contract, effective November 27, 1975. At the time of these negotiations, no mention was made of the year-end bonus for

route salesmen but Hartman paid the bonus in late 1975. The following year, Hartman and the union executed another contract and the bonus was discussed but no reference to it was put in the labor management contract.

During the year 1976, respondent Pepsi-Cola Distributing Company purchased Hartman's business without actual knowledge of the Hartman practice of paying a one cent a case bonus to its salesmen. While the new ownership became effective February 1, 1977, and the management told the route salesmen that there would be no change in pay structure, the record indicates that the new management did not become aware of the bonus until some time in May. Respondent did not discuss the matter with the union or with its route salesmen until

some of them began asking about the bonus, at which time General Manager Moore reviewed Hartman's payroll records and found that Hartman had paid its route salesmen the full rate due under the contract and that the one cent per case bonus was paid in addition to wages under the contract. At that point, Moore informed the route salesmen that he would not pay the year-end bonus.

On complaint filed by the General Counsel alleging that the company had violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally withholding the 1977 bonus, the Administrative Law Judge who heard this case initially found that the Christmas bonus "was essentially part of [the route salesmen's] employment as distinguished from

being in nature a gift or gratuity" and that the employer was under a duty to negotiate with the union prior to effecting any change therewith, citing NLRB v. Katz, 369 U.S. 736 (1962); Leeds & Northrup Co. v. NLRB, 391 F. 2d 874 (3rd Cir. 1968), unless the union had previously waived its bargaining rights. On his analysis, the ALJ concluded that the waiver clause in the contract previously signed by Hartman with the union served to relieve the successor Pepsi-Cola Distributing Company of any obligation to continue the bonus or to negotiate with the union in relation to discontinuing it in advance of doing so even though the ALJ acknowledged "that employees hired after respondent's takeover were told that their pay and conditions would remain the same."

In this respect, the ALJ relied upon Bancroft-Whitney Co., Inc., 214 NLRB 57 (1974).

On review by the NLRB, a three-member panel thereof held that the Bancroft-Whitney decision was not determinative in relation to this case. Its reasoning concerning Bancroft-Whitney bears quotation here:

> ...the Board found that the union had clearly waived any right to bargain about the payment of an annual wage dividend during the contract's duration. In that case, bargaining was extensive and the contract contained a clear and specific provision that "all wages and other benefits to be received are contained in this agreement."
>
> The law is settled that the right to be consulted concerning unilateral changes in terms of employment is a right given by statute and not one obtained by contract and that, in order to establish a waiver of a statutory right, there must be a showing of a clear relinquishment of the right. Whether there has been a clear

> relinquishment of the right is to be decided on the facts and circumstances surrounding the making of the contract.[4] Having considered all the circumstances herein, we conclude that there has been no showing that the Union relinquished its statutory right to bargain over the year-end bonus.

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[4] McDonnell Douglas Corporation, 224 NLRB 881, 887 (1976),

The Board thereupon ordered respondent to cease and desist from "unilaterally without notification of or consultation with the union discontinuing its past practice of conferring upon its route salesmen a year-end bonus" and required the respondent to pay the 1977 year-end bonus and to bargain collectively in relation to any change of practice concerning it.

While this case is not beyond dispute, we conclude that the union had a statutory right to be consulted about changes in

relation to the bonus paying practices before it was discontinued and that the Board's order is consistent with Section 8(d) of the Act which requires the parties to "confer in good faith with respect to wages, hours and other terms and conditions of employment." In the unanimous decision in NLRB v. Katz, supra, the opinion for the court said as follows:

> The duty "to bargain collectively" enjoined by §8(a)(5) is defined by §8(d) as the duty to "meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact — "to meet . . . and confer" — about any of the mandatory subjects.[10] A refusal to negotiate in fact as to any subject which is within §8(d), and about which the union seeks to negotiate, violates §8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good

faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of §8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal.[11]

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[10] See, e.g., Labor Board v. Allison & Co., 165 F. 2d 766.

[11] Compare Medo Corp. v. Labor Board, 321 U.S. 678; May Department Stores v. Labor Board, 326 U.S. 376; Labor Board v. Crompton-Highland Mills, 337 U.S. 217.

In Medo, the Court held that the employer interfered with his employees' right to bargain collectively through a chosen representative, in violation of §8(1), 49 Stat. 452 (now §8(a)(1)), when it treated directly with employees and granted them a wage increase in return for their promise to repudiate the union they had designated as their representative. It further held that the employer violated the statutory duty to bargain when he refused to negotiate with the union after the employees had carried out their promise.

May held that the employer violated §8(1) when, after having unequivocally refused to bargain with a certified union on the ground that the unit was inappropriate, it announced that it

> had applied to the War Labor Board for permission to grant a wage increase to all its employees except those whose wages had been fixed by "closed shop agreements."
>
> Crompton-Highland Mills sustained the Board's conclusion that the employer's unilateral grant of a wage increase substantially greater than any it had offered to the union during negotiations which had ended in impasse clearly manifested bad faith and violated the employer's duty to bargain.

369 U.S. at 742-743.

The dissent in this case relies upon NLRB v. Southern Materials Co., 447 F. 2d 15 (4th Cir. 1971), There on somewhat similar facts, enforcement of a Board order to pay Christmas bonuses was denied. In that case, however, the bonuses were small and consistent with being Christmas gifts, as opposed to part of regular compensation.

In our instant case, Pepsi-Cola had assured employees that their compensation would be the same as it had been under the

Hartman administration. Additionally, it appears clear to us that the year-end payments were not mere bonuses, but were a regularly calculated part of the route salesmen's compensation, based upon a formula of one cent per case. Thus, what we deal with here, as opposed to Southern Materials, is a unilateral management change of one of the fundamental issues of collective bargaining; namely, wages.

On this record, where a successor employer has promised to continue previously established compensation, a general waiver clause, which does not refer specifically to waiver of a portion of the promised compensation, should not be regarded as a clear and unmistakable waiver of the union's right to collective bargaining.

The petition of the Board to enforce its order is hereby granted.

Bailey Brown, Circuit Judge, dissenting.

I respectfully dissent.

The precise issue before the Board was whether Pepsi-Cola, as a successor employer that adopted the existing collective-bargaining contract effective November 1976-November 1977, committed an unfair labor practice under Section 8(a)(5) by its failure to bargain with respect to the payment of the 1977 Christmas bonus. I recognize that the Union's statutory right to bargain cannot be held to have been waived unless such result is required by the provisions of the collective bargaining contract and the surrounding circumstances. The ALJ determined that the right to bargain was waived by the clear terms of the

contract and that the surrounding circumstances did not support a different result. The Board determined that the contract was not clear as to waiver of the right to bargain, and that, moreover, the surrounding circumstances did not support a waiver by the Union. In my view, under the collective bargaining contract the parties waived the right to bargain by language that could not have been clearer had it been written by Abraham Lincoln and etched in stone. Moreover, there was nothing in the surrounding circumstances that supported a different result.

I would agree, as the ALJ determined, that this bonus, though not mentioned in the contract, was not a gratuity and had become part of Hartman's (the predecessor

employer's) wage structure. It might well be that, if the Union had taken this bonus issue to arbitration, it should have prevailed. It could have possibly prevailed either on the theory that the bonus claim had not been waived by the contract or on the theory that, even if so waived, Pepsi-Cola in effect "waived the waiver" when it obtained some information from Hartman about the bonus in May of 1977 and did not then take the matter up with the Union. (In May, Pepsi-Cola did receive information from Hartman about the bonus, but it was incorrect; the information was that the route salesmen were paid one cent per case less than the contract rate and that this amount was accumulated and paid as a "bonus" at the end of the year.) But, as I have indicated, the question before the

Board was not whether the Union had effectively waived the right to the bonus but rather whether the Union had waived the right to bargain with respect to the bonus. It was not for the Board to determine whether Pepsi-Cola was bound to pay the bonus where, as here, there was an arbitration provision in the contract to resolve such disputes. See N.L.R.B. v. C & C Plywood Corp., 385 U.S. 421 (1967) at 426-428.

First, I will deal with the terms of the collective bargaining contract and then with the surrounding circumstances.

The operative provision of this contract provided as follows:

> Section 2. The Employer and the Union agree that all matters desired by either party have been presented, discussed and incorporated herein or rejected. Accordingly, it is agreed that for the life of this Agreement each party voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter, whether or not referred to in this Agreement. (Emphasis supplied.)

In N.L.R.B. v. Southern Materials Co., 447 F. 2d 15 (4th Cir. 1971), the Fourth Circuit found the following clause to be a "clear and unmistakable" waiver of the union's right to negotiate about Christmas bonuses. The clause in Southern Materials stated (at 17):

> The Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject matter referred to or covered in this Agreement, or with respect to any subject matter not specifically referred to or covered in this Agreement. 447 F. 2d at 17.

There is no difference of consequence between the waiver clause presented here and the waiver clause before the court in Southern Materials.

As stated, there is nothing in the surrounding circumstances that could be

interpreted as a waiver of this waiver provision. It is without dispute that Pepsi-Cola had no knowledge of this practice of Hartman of paying a Christmas bonus when Pepsi-Cola bought this business and adopted this collective bargaining contract which did not mention bonus, in February of 1977. Pepsi-Cola did, in adopting this contract, verbally assure that compensation of employees would continue as under Hartman, but it obviously meant the compensation set out in the contract would be paid. Pepsi-Cola did receive some incorrect information about the bonus from Hartman, as before stated, in May of 1977 and did not consult with the Union about it. But the only effect this could have possibly had on the rights of these parties would be to create a waiver of its contract right not

to pay the bonus. It could not effect a waiver of Pepsi-Cola's contract right not to bargain with respect to the bonus.

Even if the Board were correct in determining that Pepsi-Cola was guilty of an unfair labor practice in failing to bargain with respect to the bonus, it is doubtful that it had the authority to, in effect, adjudicate the obligation of Pepsi-Cola to pay the bonus (see C & C Plywood Corp., supra, at 428) rather than to order Pepsi-Cola to bargain. In any case, the Board exercised some overkill when in spite of Pepsi-Cola's strong position, it ordered Pepsi-Cola to pay the 1977 bonus rather than to bargain with respect to it and when, in spite of the fact that the parties had settled the bonus issue as to future years, it ordered Pepsi-Cola to

bargain as to future years.

For these reasons, I respectfully dissent and would deny enforcement.

241 NLRB No. 136 FJT

D--4693
Knoxville,
Tenn.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PEPSI-COLA DISTRIBUTING COMPANY OF KNOXVILLE, TENNESSEE, INC.	)
and	)Case
TEAMSTERS LOCAL UNION NO. 519, KNOXVILLE AND VICINITY, TENNESSEE)	)10-CA-13333

DECISION AND ORDER

On September 25, 1978, Administrative Law Judge Robert G. Romano issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The General Counsel alleged that the Respondent violated Section 8(a)(5) and (1) by unilaterally, without notification to or consultation with the Union, discontinuing the predecessor's (Hartman Beverage Co.) past practice of conferring upon its route salesmen a year-end bonus.

The issue presented is whether the Union, in the course of its negotiations with Hartman, and by the resultant contract, waived its right to be consulted

about the elimination of the bonus. The Administrative Law Judge, relying on Bancroft-Whitney Co., Inc.[1], found that the Union herein clearly and unmistakably waived that right because of the parties' opportunity to negotiate mutually agreeable contract terms, the specificity of the management-rights and zipper clauses, and the completeness of the resulting contract.[2] He found that Hartman, under the Board's

1/ 214 NLRB 57 (1974), where the Board in determining the existence of a waiver, stated that it "looks to a variety of factors, including the evidence of contract negotiations, the precise wording of the relevant contractual provisions, and the completeness of the bargaining agreement."

2/ The relevant portions of the contract provisions are set forth below:

Article XXI Management Rights

Section 2. The exclusive functions and rights of management include, but are not restricted to the right . . . to establish or continue policies, practices and procedures . . . . (cont'd.)

holding in Bancroft-Whitney, would have been able to discontinue the practice without any prior negotiation with the Union, and therefore the successor Respondent, who had assumed the existing collective bargaining agreement, did not

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Footnote continued

Article XXXI Miscellaneous

Section 2. The Employer and the Union agree that all matters desired by either party have been presented, discussed and incorporated herein or rejected. Accordingly, it is agreed that for the life of this Agreement each party voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter, whether or not referred to in this Agreement.

* * * * *

Section 6. This Agreement constitutes the complete understanding of the parties with respect to all issues between them and supersedes all written memoranda, agreement or benefits heretofore made or given by the parties, or either of them.

violate Section 8(a)(5) and (1) when it told the route salesmen that it would not pay the bonus because the bonus was not in the contract.

We do not find Bancroft-Whitney determinative.[3] There the Board found that the union had clearly waived any right to bargain about the payment of an annual wage dividend during the contract's duration. In that case, bargaining was extensive and the contract contained a clear and specific provision that "all wages and other benefits to be received are contained in this agreement."

3/ Chairman Fanning agrees that Bancroft-Whitney is not determinative in THIS CASE. However, this does not mean he agrees with the finding in Bancroft-Whitney in which he did not participate. Member Jenkins dissented in Bancroft-Whitney, and would overrule that Decision.

The law is settled that the right to be consulted concerning unilateral changes in terms of employment is a right given by statute and not one obtained by contract and that, in order to establish a waiver of a statutory right, there must be a showing of a clear relinquishment of the right. Whether there has been a clear relinquishment of the right is to be decided on the facts and circumstances surrounding the making of the contract.[4] Having considered all the circumstances herein, we conclude that there has been no showing that the Union relinquished its statutory right to bargain over the year-end bonus.

Thus, for approximately 5 to 8

4/ McDonnell Douglas Corporation, 224 NLRB 881, 887 (1976).

consecutive years prior to 1977, Hartman Beverage had paid its route salesmen a year-end bonus calculated at the rate of 1 cent per case sold by individual route salesmen during the previous year. The bonus was paid only to route salesmen and was paid annually either in late November or early December.

In November 1975, Hartman and the Union entered into their first 1-year collective-bargaining agreement. At the time of the parties' negotiations regarding rates of pay, salaries, and commissions to be paid to route salesmen, there was no discussion by anyone concerning the bonus that Hartman had previously paid to the route salesmen. Robert Barnes, the Union's business agent, stated that he was unaware that a bonus had been

paid to route salesmen in previous years, and the contract made no provision for payment of any bonus. In late 1975, however, Hartman again paid the route salesmen their traditional bonus.

During negotiations for the second contract, a union committeeman raised the question as to whether the bonus was being taken out of the salary paid the route salesmen. Hartman's president, Baker, stated that he would be glad to incorporate the 1 cent per case into the drivers' salaries, but the bonus was something that had been done over the years, and it was nice to get at Christmastime to help buy presents for the children. In light of Baker's statement, the Union made no demand or request of Hartman that the payment of the bonus be expressly provided for in the

agreement, and there was no mention of the bonus in the second 1-year collective-bargaining agreement, effective from November 27, 1976, to November 26, 1977. In late November 1976, Hartman again paid the route salesmen the bonus as it had done in previous years.

On February 1, 1977, the Respondent purchased Hartman's assets but did not sign the 1976-77 collective-bargaining agreement. Nonetheless, the Respondent recognized the Union and considered itself a party to and honored the agreement. The Respondent, however, had no knowledge of Hartman's previous payments of the bonus.

Around the middle of February, officials of both Companies held a meeting with the route salesmen. One of the route salesmen asked if their pay would change.

The Respondent's president, Larry Smith, told the employees that there would be no change in pay structure. The Respondent's vice president and general manager, James Moore, told the employees that everything would be run just like it had been run. Given the Respondent's assurances, no employee raised a question at that time about bonus payments being continued in the future.

In May, Moore became aware of the bonus payment and inquired about it by contacting Hartman's former payroll official, Bernard Hartman. According to Moore, Hartman told him that the bonus paid had been based on an accrual, accumulated by employees being paid 1 penny less than the contract rate.

In late 1977, Moore received inquiries from some of the route salesmen as to when they were going to receive their bonus. Moore subsequently called a meeting of the route salesmen during the first week of December. He told them that the Respondent initially had not known of any bonus, that Bernard Hartman had said that the bonus was based on a penny accrual, but that he could find no records to support Hartman's assertions. Moore then stated that the bonus was not in the contract, that it was unfair, and that the Company was not going to pay the bonus.

Based on the foregoing, it can be reasonably inferred that Hartman and the Union intended to continue the practice of paying the year-end bonus in light of Hartman's payment of the bonus in 1975 and

1976, after the contracts had been negotiated, despite the inclusion of the management-rights and "zipper" clauses in each of the agreements on which Respondent now relies. The Union raised the issue during negotiations for the second contract, and Baker stated that the bonuses were something that had been done over the years and it was nice to get at Christmas time to help buy presents for the children. In light of Baker's statement, it is understandable that the Union did not request a specific contract provision regarding the bonuses. In addition, nothing said during these negotiations would put the Union on notice that its failure to include such a provision would preclude it from future bargaining on the subject. To the contrary,Baker's statement indicated that Hartman would continue an established practice. Thus, in the context of

negotiations, Hartman and the Union fully expected the continuation of the bonus payments and there was no clear specific and unmistakable waiver by the Union of this term and condition of employment.

We are not unaware that the Respondent was a successor employer and had no knowledge of the bonus at the time of the purchase of Hartman's assets or when it made the February assurances to employees that working conditions would remain the same. The Respondent, however, learned of the bonus at least 6 months prior to the time that the employees were scheduled to receive it, and failed to consult with the Union regarding the issues. Moreover, in November, the Respondent, once again, failed to consult the Union regarding the issue and met directly with employees.

On the basis of the foregoing, we find that the Union has not clearly and unmistakably waived its right to be consulted with regard to any change in this condition of employment. Inasmuch as a waiver is not lightly inferred, we conclude that, in the circumstances herein, there was no waiver by the Union, and the Respondent should have bargained with the Union prior to discontinuing its predecessor's established practice of paying the year-end bonus to its route salesmen.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act representing the appropriate unit

described below:

> All route salesmen, warehousemen and highlift operators employed by Respondent at its Knoxville, Tennesee, facility, excluding the vending repair department, temporary summer employees, office clerical employees and supervisors as defined in the Act.

3. The Respondent and the Union have been parties to a collective-bargaining agreement covering the employees in the unit described above.

4. By unilaterally, without notification to or consultation with the Union, discontinuing its past practice of conferring upon its route salesmen in the above unit a year-end bonus, the Respondent has violated Section 8(a)(5) and (1) of the Act.

5. The foregoing unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in an unfair labor practice, within the meaning of Section 8(a)(5) and (1), we shall order that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act, and, upon request, bargain collectively with the Union as the exclusive representative of route salesmen in the bargaining unit concerning the year-end bonus to said employees.

The Respondent's unfair labor practice consisted of its unilaterally withholding the 1977 year-end bonus from the route salesmen. Inasmuch as the bonus constituted wages, the failure to pay the bonus was a detriment suffered by said employees. It is the Board's customary policy to direct

a respondent to restore the status quo where a respondent has taken unlawful unilateral action to the detriment of its employees. Accordingly, the Respondent will make whole the route salesmen represented by the Union by paying them the 1977 year-end bonus in accordance with the long-existing formula applied by its predecessor. Further, in accordance with the Board's normal practice, the bonus will be paid with interest, to be computed in the manner set forth in Florida Steel Corporation, 231 NLRB 651 (1977).[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby

5/ See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

orders that the Respondent, Pepsi-Cola Distributing Company of Knoxville, Tennessee, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally, without notification to or consultation with the Union, discontinuing its past practice of conferring upon its route salesmen a year-end bonus.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of mutual aid or protection, as guaranteed in

Section 7 of the Act, or to refrain from any and all such activities.

2. Take the following action which the Board finds will effectuate the purposes of the Act.

(a) Bargain collectively in accordance with the provisions of Section 8(d) with respect to any change in the practice of paying the year-end bonus to the route salesmen.

(b) Make the route salesmen whole by paying the 1977 year-end bonus in the manner set forth in the section herein entitled "The Remedy."

(c) Post at its Knoxville, Tennessee, place of business copies of the attached notice marked

"Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

6/ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. April 13, 1979.

_____
John H. Fanning, Chairman

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Howard Jenkins, Jr., Member

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John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PEPSI-COLA DISTRIBUTING
COMPANY OF KNOXVILLE,
TENNESSEE, INC.

and

Case No.
10-CA-13333

TEAMSTERS LOCAL UNION
NO. 519, KNOXVILLE AND
VICINITY, TENNESSEE

Judith M. Anderson, Esq., and William E. Caldwell, Esq., for the General Counsel.

J. W. Alexander, Jr., Esq., (Blakeney, Alexander & Machen), of Charlotte, NC, for Respondent.

Robert C. Barnes, of Knoxville, TN, for the Charging Party.

DECISION

Statement of the Case

ROBERT G. ROMANO, Administrative Law Judge: This case came on for hearing before me on June 28, 1978. 1/ The charge

1/ All dates herein refer to 1978 unless stated to the contrary.

was filed by the Union 2/ on December 21, 1977 (amended January 25). An original complaint issued on February 3, alleging violation of Section 8(a)(5) and (1) of the Act by Pepsi-Cola Distributing Company of Knoxville, Tennessee, Inc. (Respondent). Timely answer was filed by Respondent on February 13, denying the commission of any unfair labor practice. An amended complaint issued on June 14, adding the allegation that Respondent since on or about February 1, 1977 was a successor employer to Hartman Beverage Company; and otherwise continued the allegation that on or about December 5, 1977, Respondent unilaterally, without notification to or consultation with the Union, had discontinued its past practice of conferring a yearend bonus upon its

2/ The Union's name appears as corrected.

route salesmen, in violation of Section 8(a)(5) and (1) of the Act. On June 23, Respondent filed additional answer, denying the commission of any unfair labor practice and praying that the complaint in this proceeding be dismissed.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by the General Counsel, on or about July 27, I make the following:

I. Findings of Fact

The Company, a Tennessee corporation, is engaged in the sale and distribution of carbonated beverages and syrup. During the past calendar year, the Company purchased and received goods and products valued in excess of $50,000 directly from suppliers located outside the State of

Tennessee. I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Alleged Unfair Labor Practices

A. Background

1. Predecessor's operation and payment of yearend or Christmas bonus

The essential facts are not in dispute. Prior to February 1, 1977, Hartman Beverage Company (Hartman or predecessor), operated the facility involved herein, located in Knoxville, Tennessee, where it engaged in the sale of carbonated beverages and syrup. Joe A. Baker was president of Hartman. For a significant number of years (5-8) prior to selling his company

to Respondent in February 1977, Baker had paid his route salesmen (only) a yearend or Christmas bonus calculated at the rate of 1 cent per case of product sold by the individual route salesman during the previous year.3/ There were some 65-70 route salesmen who regularly received such bonus. Hartman also employed warehousemen and high lift operators at its Knoxville facility who did not receive any bonus. The bonus was paid annually either in late November or early December. If an employee quit he was also paid the bonus on the base of his personal accumulated sales between the time of the last bonus payment and the date of his resigning.

3/ Baker estimated that he had paid the bonus for approximately 5 years prior to his sale of the Company. Employee Gerald Haggard recalled that he had received such bonus for approximately 8 years.

2. The certification of the Union; successive collective-bargaining agreements; continued payment of the bonus by predecessor Hartman

On August 1, 1975, an election by secret ballot was conducted in an appropriate unit 4/ under the supervision of the Regional Director for Region 10 of the Board. A majority of the employees designated and selected the Union as their representative for the purpose of collective-bargaining with Hartman with respect to rates of pay, wages, hours of employment and other terms and conditions of

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4/ Determined as an appropriate unit therein was:

> All route salesmen, warehousemen and high lift operators employed by Hartman Beverage Company at its Knoxville, Tennessee facility, excluding the vending repair department, temporary summer employees, office clerical employees and supervisors as defined in the Act.

employment. On August 11, 1975, the Regional Director for Region 10 of the Board certified the Union as the exclusive collective-bargaining representative of all the employees in the above unit. At hearing Respondent stipulated that for purposes of this hearing, the aforesaid unit was an appropriate unit and that the Union is the collective-bargaining representative of the employees in that unit. I so find.

On November 27, 1975, Hartman and the Union entered their first 1-year collective-bargaining agreement covering the employees in the above bargaining unit. The contract by its terms extended through November 26, 1976. Baker negotiated this first (1975-1976) contract with Robert Barnes, then a newly appointed business representative with the Union. Baker testified credibly that

at the time of their discussions concerning the rates of pay, salaries and commissions to be paid the route salesmen, warehousemen and forklift operators, that there was no discussion by anybody about the bonus that he had paid the route salesmen. Business representative Barnes confirmed that at the time of the negotiation of this first contract that the subject matter of bonus was not mentioned; and testified frankly that at that time he had not even been aware that a bonus had been paid the route salesmen in prior years. It is unquestioned that the contract made no provision for payment of any bonus. Nonetheless, in late 1975, Hartman again paid the route salesmen (only) the bonus as it had in years past.

A second 1-year collective-bargaining

agreement between Hartman and the Union was subsequently negotiated. The second contract was effective by its terms from November 27, 1976 to November 26, 1977. 5/ In late 1976 Hartman again paid the route salesmen (only) the bonus as it had in years past. The 1976-1977 contract also had made no specific provision for the payment of any bonus to any employee. However, unlike the negotiations which led to

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5/ While president Baker unclearly recalled the second (1976-1977) contract was left with Respondent to negotiate, the contract in evidence shows the contractual relationship was entered and thus initially existed between Hartman and the Union, since president Baker was signatory. I thus find that the second contract was also negotiated by Baker and Barnes, as Barnes' testimony otherwise indicated. (I note Smith testified to no prior discussion with the Union about the purchase of Hartman in any fashion.)

the first contract, the Union was aware that a bonus had been paid to route salesmen at the time of the negotiations leading to the second agreement. Barnes recalled that there was a question raised by a union committeeman about the bonus in the negotiations; and that the question was raised whether the bonus was being taken out of the salary paid the route salesmen. According, to Barnes, Baker at that time said that the bonus was not taken out of employees' salary. Baker said that he would be glad to incorporate a penny into their salary because it would made it a lot easier on the bookwork. Baker added that the bonus was something that had been done over the years; and that it was nice to get at Christmas time to help buy toys and stuff for the children. Barnes' testimony

stands uncontradicted, and I credit it. 6/

6/ Respondent objected to this entire line of questioning about what was orally discussed in negotiations about the subject matter of the bonus. The objection was overruled. I continue to adhere to that ruling. This contract is silent in haec verba as to bonus payment. Such evidence in that circumstance is available to assist in ascertainment of the intendment of the parties who negotiated the terms of the agreement under consideration. Particularly is this so where a contractual claim of statutory waiver by the Union is raised by the Respondent. However, otherwise I would note that the significance of the remark in negotiations is still a matter itself to be evaluated with all other relevant and probative evidence; including of course, other express terms and provisions of the contract which may also bear upon that very subject matter though not with optimum desired express or explicit reference. This was otherwise an integrated agreement of the parties, one fully addressing itself to a wide scope of wages, hours and other terms and conditions of employment to be applicable to the bargaining unit employees, as well as in memoralizing the reservation by Hartman of various management rights to promote orderly, efficient, safe and profitable operation of the business, provided done so in a manner that did not violate any express provision of the agreement. Not alleviated is (continued)

It is observed that the Union made no demand or request of Hartman at that time that the payment of the bonus to the route salesmen should be expressly provided for in the agreement, nor was there any discussion by the parties concerning a reason (if any) that bonus payment to route salesmen would not appear in the contract. In contrast I note that the contract does provide otherwise that certain of its terms (lunch period, rest periods, overtime and call back provisions) are not applicable

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6/ (continued)

the need for an evaluation of the circumstances that Respondent-Successor, though assuming the contract, was not party to that discussion. At this point I merely observe the additional possibility of a further analysis requirement of reasonable effects of the circumstance that Respondent was not aware of any extra contract policy or practice on bonus payments at the time it took over the operation of predecessor Hartman.

to route salesmen who are paid on commission. The parties to the contract thus evidenced ability and willingness to reflect certain benefits as applicable to certain employees and not others when they desired to do so.

3. Respondent's acquisition and successorship to Hartman

On February 1, 1977, Respondent purchased the assets of Hartman. Respondent stipulated at the hearing that for purposes of this proceeding it has thereafter operated the former Hartman facilities, has engaged in substantially the same business; and has employed the same supervisors and the majority of the employees formerly employed by Hartman. For purposes of this hearing Respondent has stipulated that it is a successor employer to Hartman. I so find.

On taking over on February 1, 1977 the Respondent did not sign the (then) current agreement, nor had it previously discussed such action with the Union. However, the record is clear and Respondent admits that commencing with its purchase of Hartman on February 1, 1977, it has considered itself party to and has honored and given effect to all the terms of that (1976-1977) collective-bargaining contract between the Union and its predecessor. I so find. I find collaterally that commencing February 1, 1977, Respondent-Successor in assuming and putting into effect the terms of the existing labor agreement thereby effectively recognized the Union on February 1, 1977, as the collective-bargaining representative of its employees. Respondent also admits the fact that it did not pay

any yearend bonus to any employees. I further find that Respondent announced to its route salesmen in approximately the first week of December 1977 that it was not going to pay a bonus; and that it did so without any prior consultation with the Union.

Negotiations conducted thereafter by the Respondent-Successor and the Union have led to a current 1977-1978 agreement during which the parties fully discussed and have now adjusted the issue of future bonus payment to their mutual satisfaction. Resulting it appears clearly of record that the sole issue presented for resolution in the instant proceeding involves the question of the propriety of Respondent's action, in view of its previously established and acknowledged bargaining

relationship with the Union commencing February 1, 1977, in announcing to bargaining unit employees in early December 1977, upon their inquiry, and without any prior consultation with their representative, that Respondent was not going to pay the yearend or Christmas bonus to the route salesmen.

4. Pertinent provisions of the assumed collective-bargaining agreement

The second contract (1976-1977) specifically provides (Article XII, Rates of Pay and Classifications):

> Section 1. Rates of pay and pay schedule "A" attached hereto, shall remain in effect for the life of this Agreement and shall constitute the basis for determination of wages for time worked.

Schedule "A", indeed the entire contract as earlier noted, is silent on bonus payment to route salesmen in haec yerba; that

is, in the sense that there is no explicit expression of party intendment on the subject of bonus payments to route salesmen. However, Hartman contracted for a management clause (Article XXI) by which it retained common law rights to manage the business, with certain specified inclusions. In pertinent part and notably as further described therein as a discretionary and exclusive function and right of management was the right ". . . to establish or continue policies, practices and procedures; . . ." (emphasis supplied).

The contract makes provision for grievances covering differences arising between the Employer and the Union, and for binding arbitration. The same are restricted in scope as to the meaning, application, interpretation or alleged violation of the

agreement; and the arbitration board therein provided for, is itself to be ". . . controlled completely by the terms of the agreement and it is bound to decide issues properly before it on the authority given it under the agreement, . . ." which is generally also restricted to the language of the agreement; and with further specific instruction that "all matters deemed by the parties to be proper subjects for bargaining and arbitration are set forth in the agreement." (Emphasis supplied.)

As earlier noted this contract was effective November 26, 1976. In late 1976 Hartman again paid the Christmas bonus to its route salesmen. In that regard the agreement also provided on the one hand with regard to action of Hartman on any matter within its reserved right of

management that the same shall not be subject to arbitration unless it violates the provisions of the agreement; and on the other hand with regard to a failure of Hartman to exercise a management right on one occasion that the same ". . . shall not be a precedent or binding . . ." in another instance; nor is such action to ". . . be the basis for any claimed grievance."

Finally noteworthy and provisions especially relied upon by Respondent-Successor (discussed infra), are the provisions of Article XXXI miscellaneous, which in pertinent part provide:

> Section 2. The Employer and the Union agree that all matters desired by either party have been presented, discussed and incorporated herein or rejected. Accordingly, it is agreed that for the life of this Agreement each party voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively

with respect to any subject or matter, whether or not referred to in this Agreement.

* * *

Section 6. This Agreement constitutes the complete understanding of the parties with respect to all issues between them and supersedes all written memoranda, agreement or benefits heretofore made or given by the parties, or either of them.

5. Other considerations

To properly evaluate the issue of bargaining-obligation deviation, if any, in Respondent's recognition of the Union and assumption of the above collective-bargaining agreement but subsequent nonpayment of bonus to the route salesmen, it is helpful to develop briefly certain additional facts explanatory of Respondent's purchase of Hartman, employees continued employment conditions, and Respondent's interim conduct bearing upon the latter.

Mr. Larry Smith has corporate overall

responsibility over some 14 facilities, including the facility of Respondent, as its president. Smith (with substantial and supportive testimony of Baker) testified that discussions, which eventually led to Respondent's purchase of Hartman on February 1, 1977, had commenced some several months earlier, approximately in October or November, 1977. Appropriate prift and loss statements of Hartman were made available to Smith as prospective purchaser. In due course, supporting records of Hartman were reviewed by Smith's accountants and lawyers and appropriate checks were made of the profit and loss statements. A final 2-3 inch financial and legal report evaluating the prospective purchase was prepared by Smith's fiscal and legal agents and delivered to

Smith for his review. In the interim Smith had also been presented by Baker with a copy of the (second) union contract as containing the wages that were paid unit employees, as well as a statement of all wages/salaries that were paid nonunit personnel. Smith testified, and I find credibly so, that at the time he bought Hartman he simply was not aware that any bonus payments had been made by predecessor to its route salesmen. 7/ Smith testified that when he bought Hartman it was thus

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7/ In this area Smith's testimony appears as wholly persuasive on the record on review as it was convincingly presented by Smith when on the stand. Thus Smith testified that the matter of bonus payments was never a subject mentioned to him, or one that his accountants had discussed with him; and that it also was not referenced in the evaluative report which he reviewed prior to purchase, and which he double checked when this dispute arose.

with a belief and with a reliance that the union contract accurately portrayed the labor costs of the employees involved, asserting he had no reason at that time to believe that it did not. 8/ Baker's testimony is supportive of Smith's lack of awareness. Thus in Baker's contract with Respondent, predecessor Hartman had guaranteed that all Harman liabilities were reflected and accrued on Hartman books; and to generally accepted accounting principles. Baker testified that there was in fact no accrual shown for any future

8/ Although Smith conceded he has had limited (if any) prior experience with union contracts, Smith testified that he reviewed this union contract carefully before the purchase and had been impressed with its "zipper" clause, particularly in view of several precise references in the contract to (what he considered) were a recitement of very minor benefit matters.

bonus payment. Baker explained that in his operation of the business he did not accrue that expense over the year. Thus Baker had a regular procedure of recording accumulated cases sold by the individual salesmen for other business purposes. His bonus payment procedure was that at the appointed time he would then pay the bonus to the salesmen at the (formula) rate of 1 cent per case then shown as sold by the individual salesmen in the past year. Baker testified that with all the other matters that were being discussed and covered in this sale that he had simply not thought of the bonus matter. I find that at the time of Respondent's purchase of Hartman, and at the time that Respondent's Smith put into effect the wages, hours and other terms and conditions of employment as set forth in the existing

labor agreement, that Smith was in fact not aware that any bonus had been paid in the past by the predecessor. 9/ I thus

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9/ The General Counsel made a run at showing that if Respondent was not aware of bonus payments, the circumstances were such that Respondent should be held accountable for an awareness that there were such benefit payments in the past. However I find that the offered evidence in that area is wholly unpersuasive. The principal contention of the General Counsel would appear to be that by virtue of the fact that all of the records were available and eventually turned over to Respondent, it was thereby put on notice that such a benefit had been paid in the past. Baker testified in support of Respondent that none of the records that he had turned over would reasonably have put a purchaser on notice. While I make no evaluation with regard to the matter of compliance by Baker under the purchase contract which is not an issue before me, I do note that in context of circumstances that no accrual was shown on Baker's records, Baker's additional testimony that none of the records he turned over to Respondent would reasonably have put Respondent on notice of a bonus payment would appear to be seemingly an admission against his interest. In any event, Baker's system of bookkeeping would appear to be supportive of both Smith and Baker. Although I credit employee testimony that they had been paid the bonus (continued)

conclude that there is no convincing or persuasive evidence presented in this

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9/ (continued) by a separate check, the record has also revealed that when employees received vacation pay it had been combined with their regular weekly (commission) pay. I must thus consider Baker's additional testimony that the bonus payment was made on one week in either November or December and entered only on the payroll for that week. His system of accounting otherwise provided that the weekly payroll expenses were then accumulated for the month and transferred to ledger accounts from which eventually the profit and loss statements were prepared. Although Smith's accountants were free to make a check of books and records, they did so to determine the accuracy of the given profit and loss statements. The fact is, in any event, that Smith's testimony stands uncontradicted that his accountants did not raise bonus payments as a discussion matter with him, nor report on it in their otherwise comprehensive evaluative report. Then too Smith testified that even a $30,000-$40,000 variance in monthly payroll expense would not have been unstandard, when it is borne in mind that employees were paid on commission which fluctuated with changes in sales. Respondent's annual sales increased substantially (25 percent) over predecessor. The short of the matter is that with the above as background I am simply not persuaded by at best a generalized contention of General Counsel that Smith (continued)

record to warrant a conclusion that Respondent (Smith) knew or reasonably should have

9/ (continued) was aware, or that Respondent is to be held accountable for an awareness of the bonus payment made prior to its purchase of Hartman's operation. It necessarily would follow that at the earliest time that it may be presumed that Respondent assumed and put into effect the existing wages, hours and terms and conditions of employment as expressed in the collective-bargaining agreement between predecessor and the Union Smith knew nothing about predecessor's payment of a bonus. General Counsel's other offerings to the contrary simply never got off the ground. Thus Smith testified that his company had absolutely no prior interest in Hartman; and James Moore, vice president and general manager of Respondent, and apparently the chief operating officer of Respondent since commencement of Respondent's Knoxville operations, testified that he did not become aware of a (predecessor) employee booklet (presumably containing reference to bonus payment) until December of 1977 or January of 1978 and in any event not until after the material event of his announcement to the employees that the Respondent was not going to pay bonuses to route salesmen because it was not in the assumed contract.

known of the predecessor's payment of bonus, at the time of Respondent's purchase of Hartman or commencement of its own operations, accomplished with the contemporaneous assumption and application of the current collective-bargaining agreement to its employees at that time.

Shortly after the purchase, thus around the middle of February, there was a meeting of the officials of both companies with all the assembled route salesmen. At this meeting president Larry Smith upon being asked by a route salesman if the pay would change, told the employees that there would be no change in pay structure. Moore who was also present told the employees that everything would run just like it had been run. 10/ No question was raised at that

10/ These findings are based on credited and generally mutually consistent (continued)

time by any employee about bonus payments being continued in the future.

In late 1977, Moore received inquiries from some of the route salesmen as to when they were going to receive their bonus. Moore subsequently called a meeting of the route salesmen about the first week in December 1977. Moore told them that Respondent had not initially known of any

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10/ (continued) testimony of employees Gerald Haggard and Daryl Livingston, and Respondent's officials Smith and Moore. I would note that Moore, in essentially confirming the above, testified that he had told the employees that the working conditions would remain the same, and that he told the sales force at that time that their wages were covered by the union contract and that it would be honored. Under the total circumstances herein I do not view it as controlling of the issue whether the employees were told by Respondent's officials that there would be no change in pay structure or that they would be paid in accordance with the union contract which was to be honored.

bonus, that Bernard Hartman (employed by predecessor) had told Moore that the bonus was based on a penny accrual but that on investigation Moore could find no records to support that, that the bonus was not in the contract, that it was unfair, and that the Company was not going to pay the bonus. 11/ Moore testified candidly that

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11/ This finding is based on essentially mutually corroborative and consistent testimony of Moore and employees Haggard and Livingston. I have considered employee Haggard's recollection that Moore had said it was not company policy to give bonuses to anyone and that the employees would not be receiving one. In this respect employee Haggard was not corroborated by Livingston who only recalled that Moore had remarked it was not fair. In this connection also there is uncontested evidence of record that in subsequent negotiation sessions held shortly thereafter the Company in fact offered a penny across-the-board to all unit employees which could be used by them either for a bonus or as part of their wage increase. I am thus satisfied that any reference by Moore on this subject on an earlier occasion would have been that it was not company policy to give bonuses to certain employees in the unit (continued)

his first awareness of the subject of bonus payment was considerably earlier, about May 1977. At that time Moore made a limited inquiry of Bernard Hartman who was employed by Hartman and who had handled Hartman's computer program and payroll. Moore was informed at that time that the bonus paid by Hartman had been based on an accrual, accumulated by employees being paid one penny less than the contract rate. In contrast Respondent has at all times paid its employees the full rate as specified in the contract. On purchase, all of Hartman's records had been sent to corporate headquarters of Respondent.

11/ (continued) and not to others. In any event such a remark, in nature an expression of Respondent's reason for its position would not materially effect the outcome on the ultimate issue of Respondent's alleged unlawful unilateral change of an existing benefit.

Moore had neither previously reviewed them nor had he pursued an investigation beyond the above inquiry of Hartman's payroll official. However I am wholly satisfied that Moore would have discussed the subject with Smith at the time inasmuch as there is frequent business communication between them. No action was taken on the bonuses until December. When the issue arose again, I find in early December 1977, Moore at that time made a check of actual Hartman records. Moore then discovered that there had not been an accrual based upon a withholding by Hartman of one penny less than the contract rate. Rather payment was thus extra contract. In short Moore had been told one thing on the occasion of his inquiry

of the former Hartman payroll official in May, and discovered another thing was the actual case from his review of Hartman records much later in the year when the issue arose at about the time of its prior payment which approximately coincided with expiration of the contract. It is to be noted that Moore's subsequent discussions of the subject of bonus payments in negotiations took place after the contract had expired and after an announcement had been made by him to the route salesmen that the bonus would not be paid, though prior to the time when Moore then understood the predecessor would have paid it.

Finally, Moore testified that it was he who made the decision not to pay the bonus; that it was corporate policy to live up

fully to the terms and conditions of the contract, but inasmuch as the bonus was not in the contract, there was no obligation for Respondent to pay it. President Smith confirmed that Respondent's position has been, is, and will continue to be, to pay everything that is in the union contract and within his control. Under the total circumstances above it would appear to me that the latter is to be taken to mean, that which Respondent holds it was reasonably aware of and had previously agreed to in assuming and putting into effect the terms of the union contract when it commenced its operations, but nothing beyond that.

Contentions of the Parties

While conceding that the bonus was never covered by the contract's express terms General Counsel essentially takes the position that in view of the number and regularity of years that employees had received the yearend bonus in the past, and the definitive basis of calculating the amount in relation to work performance of route salesmen and time of year paid, that the payment of an annual yearend or Christmas bonus to route salesmen had become an established past practice existing outside the contract. General Counsel thus contends that it became an obligation upon the Respondent as a successor to either continue to pay the bonus to the route salesmen or to bargain with the Union about the bonus before

Respondent's discontinuance of that practice. Respondent's position as stated at hearing[12] appears to be that at the time it purchased the Hartman facility it was only aware of the labor costs as contained in the predecessor's contract with the Union which also contained an effective zipper clause; that it proceeded in its purchase of predecessor in reliance

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12/ As previously observed, Respondent has not filed a brief. I also note that all the witnesses herein were called by the General Counsel and examined either as General Counsel's own material witness or specifically under Rule 611(c). With testimony developed on direct and cross-examination of all the principal witnesses when called by the General Counsel, the Respondent took the position that it had nothing further to present; and Respondent also rested without presentment of any additional evidence or argument.

thereon; that it, accordingly planned to and did put into effect the terms and conditions of that union contract and has fully abided by the same. At the hearing Respondent elicited some testimony from Baker to the effect that prior bonus payments had been made on Baker's own volition each year as Baker saw fit to do. It is unclear whether Respondent thereby intends argument that prior bonus payments were in nature gifts. In any event General Counsel contracontends that such payments would clearly constitute wages; and argues that the zipper clause is itself not sufficiently broad to constitute a waiver of what must be concluded was a longstanding practice then existing outside the contract. Respondent's basic position as expressed by Smith is that "its position has been,

and is, and will continue to be, to pay everything that is in the union contract and within its control, but nothing beyond that." No grievance has heretofore been filed on this matter. No party has requested that the Board defer resolution of this issue to arbitration. Consequently deferral of the issue to arbitration is not a matter before me. Bancroft-Whitney Co., Inc., 214 NLRB 57, 61.

In my view the issues presented in the above case may fairly be framed at this juncture as being: (1) Whether the Christmas or yearend bonuses under the circumstances of the instant case are to be construed as constituting wages and the prior payment of same such as to constitute a past practice existing outside the contract; (2) whether the contract on the basis of its terms and

other considerations warrants a conclusion that the Union effectively waived its bargaining rights concerning the bonus payments; and (3) whether or not, even assuming that it be found that the instant Christmas or yearend bonus payments to route salesmen are to be concluded as having constituted wages paid in accordance with a past practice existing outside the contract by predecessor Hartman and not waived contractually by the Union whether the additional circumstance that the successor assumed the contract without any prior awareness of such a past practice existing outside the contract, and without any fraud or illusion being evidenced, is itself a factor such as to preclude any violation being found herein.

Analysis, Conclusions and Findings

General Counsel's position is readily seen to prevail on the first question. The nature of the bonuses paid by predecessor-Hartman to route salesmen was such as to clearly render bonus payments a collective-bargaining subject matter. Thus, on the basis of the number of years and regularity with which the bonuses were paid, the remarkably explicit formula with which calculated, and the clearly defined incentive relationship to sales work performed by the route salesmen, I conclude and find that the yearend or Christmas bonuses paid previously by predecessor Hartman to its route salesmen was essentially part of their compensatory wage structure and a term or condition of their employment as distinguished from being in nature a

gift or gratuity. Mississippi Steel Corp., 169 NLRB 647, 649; mod. on other grounds D.C.C.A., 405 F. 2d 1373; Gulf States Manufacturers, Inc., 230 NLRB No. 81. Further, unless on the facts shown above it is otherwise clearly warranted to be concluded that the Union had previously waived its bargaining rights thereon, equally clearly an employer committed to such an established past practice, is under a duty to negotiate with the Union prior to effecting any proposed change thereof. N.L.R.B. v. Katz, 369 U.S. 736 (1962); Leeds & Northrup Company v. N.L.R.B., Cir. 3, 391 F.2d 874, 877 (1968). The bargaining obligation thereon is one which is imposed prior to any change; and the violation occurs when there is a unilateral discontinuance, which is not

cured by an employer's subsequently expressed willingness to bargain on the subject "after the fact"; Stark Ceramics, Inc., 155 NLRB 1258, 1265 enfd. Cir. 6, 375 F.2d 202 (1967); Mississippi Steel Corp., supra.

The second (waiver) issue presented is much more difficult to resolve as it involves required evaluation of a number of factors. For it to be concluded that a union has contractually waived a right to bargain about a particular bargainable matter which the statute (Section 8(d)) independently provides the union, the evidence must convincingly show the surrender of the statutory right. The test of relinquishment has been variously stated over the years as one which should appear in "clear and unmistakable"

language. The Timken Roller Bearing Co. v. N.L.R.B., Cir. 6, 325 F.2d 746, 751, cert. denied 376 U.S. 971; N.L.R.B. v. Perkins Machine Company, Cir. 1, 326 F.2d 488; N.L.R.B. v. The Item Company, Cir. 5, 220 F.2d 956, 958-959, cert. denied 350 U.S. 836. Thus even with a broad voluntary and unqualified contractual waiver of right to bargain collectively essentially with respect "to any subject or matter" the negotiations are to be reviewed and evaluated for showing convincing ground for an implied surrender or agreement, e.g., that the particular matter was "fully discussed" or "consciously explored" and the Union "consciously yielded," Rockwell-Standard Corporation, 166 NLRB 124, 132, enfd. Cir. 6, 410 F.2d 953 (1969). This is not to say the Board would have

ignored equally clear evidence of what has taken place at the bargaining table. To the contrary, the Board has indicated the issue of waiver is to be determined on a broad objective basis, e.g., with appropriate consideration and evaluation of all relevant factors, including such factors as: "(a) the precise wording of, and emphasis placed upon, any zipper clause agreed upon; (b) other proposals advanced and accepted or rejected during bargaining; (c) the completeness of the bargaining agreement as an "integration" - hence the applicability or inapplicability of the parol evidence rule; and (d) practices by the other parties under other collective-bargaining agreements." Radioear Corporation, 199 NLRB 1161; Valley Ford Sales, Inc., 211 NLRB 834, 835. Facts and circumstances

surrounding the making of the contract clearly may be considered, Leeds & Northrup Co. v. N.L.R.B. Cir. 3, 391 F.2d 874 (1968); Bancroft-Whitney Co., Inc., 214 NLRB 57. Nonetheless it remains clear that in order to establish the waiver of a statutory right there must be a showing from all the facts that there has been a clear relinquishment of the statutory right, N.L.R.B. v. C & C Plywood Corporation, 385 U.S. 421, 423, 428, 430-431 (1967); McDonnell Douglas Corporation, 224 NLRB 881, 887; Clevenger Logging, Inc., 220 NLRB 768, 780.

General Counsel concedes there is no mention of the bonuses in the contract. Nonetheless, General Counsel argues that the zipper clause in the contract is not sufficiently broad to constitute a waiver by the Union of what was otherwise a long

standing practice of bonus payment existing prior to and outside the contract. None of General Counsel's cited authority may be deemed to control the waiver issue presented herein. As noted Respondent has filed no brief. The Board's holding in Bancroft-Whitney Co., Inc., supra, would appear to be dispositive of the matter before me.

In Bancroft-Whitney the bonus history was even more long standing than herein. There the facts were that for 11 years, prior to the advent of a Union, the employer had paid its employees a bonus (there called a wage dividend), in December of each year. A Union was certified and had acquiesced during negotiations in the employer's expressed desire to pay to all employees the bonus as it had in years past. Thereafter an otherwise complete contract was

eventually negotiated by the parties. There was no reference in that resulting contract to a payment of a wage dividend to the unit employees. Subsequent to execution of the contract, in the following November, the Employer announced to all employees that the usual wage dividend was to be paid to all employees except those in the bargaining unit represented by the Union "whose pay and benefits are provided for in the collective-bargaining agreement . . . ." There, as here, the employer explained to the unit employees that they were not to receive the bonus "because their contract did not provide for it."

The contractual provisions in Bancroft-Whitney were very much similar to those presented by the facts of this case. Thus, in Bancroft-Whitney there

was a management rights clause which provided that the employer retained "any and all rights" it enjoyed prior to execution of the contract "except as specifically and expressly limited or modified," by the contract. Here similar general rights were not only retained, there was notably an explicit recitement of a specific discretionary right being retained as the "exclusive function and right of management . . . to establish or continue policies, practices and procedures . . . ." (Emphasis supplied.) In Bancroft-Whitney there was a specific recitement that "all wages and other benefits to be received are contained in this agreement." Herein there is essentially the same party committal as to wages in that it is provided the pay shcedule "A"

is to remain in effect for the life of the agreement and it is explicitly agreed by the parties that it "shall constitute the basis for determination of wages for time worked." Present also herein (and apparently not present in the Bancroft-Whitney case) was a confirming provision found in the grievance and arbitration section instructing the arbitration board provided for resolution of differences of the parties that "all matters deemed by the parties to be proper subjects of bargaining and arbitration are set forth in the agreement." (Emphasis supplied.)

Additionally, in Bancroft-Whitney, as herein, the "zipper clause" was essentially the same, viz, a clear statement that the contract which the parties had arrived at was their full bargain. Thus in Bancroft-

Whitney it was expressed: "The parties agree that they have fully bargained with respect to wages, hours and other terms and conditions of employment and have settled these for the term of this agreement in accordance with the terms hereof." If anything, the instant miscellaneous clauses were (in combination) even tighter. Thus not only was there an equally broad general waiver of a further bargaining requirement on any subject or matter, there was also an explicit recitement by the parties that the Employer and the Union herein were in agreement that all matters desired by either party had been presented, discussed and incorporated herein or rejected; and it was agreed by the same parties that each "voluntarily and unqualifiedly" waived

the right to bargain; and each agreed the other was not obligated to bargain collectively "with respect to any subject or matter, whether or not referred to in the agreement." There was an even more explicit statement by the parties herein that their agreement constituted their "complete understanding" with seemingly a conscious expression of extraneous benefit surrender in that it was agreed that the contract superseded "all written memoranda, agreement or benefits heretofore made or given by the parties, or either of them." (Emphasis supplied.)

I do not overlook the circumstances in this case that predecessor Hartman, these contractual provisions notwithstanding, twice paid a bonus outside a collective-bargaining agreement, the latter occasion

itself being within the effective life of this agreement. Nor do I overlook the circumstance that Hartman during its last negotiations had offered the Union a penny in wages in lieu of bonus. The fact remains the penny offer was not accepted and a bonus provision was not put in the contract. Rather the agreement eventually reached by the parties provides for a number of other benefits. It remains true that there is no specific reference in the contract at all to bonus payments; and that a waiver of a statutory right in that respect, particularly on an established past practice is a result not to be lightly inferred from the contract or the Union's conduct. In that regard, however, I do not believe I can ignore the meaning of all the other explicit provisions in the contract agreed

to by the Union and the Employer therein; viz., that Employer has bargained from the Union an agreed retention by Employer as an exclusive and unqualified management right, a right not only to establish but to continue (necessarily encompassing existing) practices, policies and procedures. Here the parties also had agreed explicitly that a failure on management's part to exercise a management right on one occasion was not to be considered as "precedent or binding" on another occasion. Nor may I ignore what appears to me to be quite clear mutual expressions of agreement that benefits granted are delimited to the contract, to wit: the contract supercedes benefits given by either party; that all desired matters have been presented, discussed and

are either incorporated or rejected; and that all matters deemed bargainable by the parties are in agreement. In that latter regard, I note that in Bancroft-Whitney, as herein, there was a discussion by the parties during negotiations in which the annual dividend payment was brought directly to the Union's attention. In Bancroft-Whitney, as herein, it was noted that the Union never asked for bargaining over the dividend or that any provision be made expressly for it in the agreement. Instead the parties (as here) later agreed to a complete contract otherwise which by its terms fully specified a wide range of wages, and other terms and conditions of employment with described management right retentions. Here (as there) there is recital of party agreement that the parties

had fully bargained with respect to all such matters and that the wages and bargainable matter are in the contract.

The instant case in my view thus does not present the usual situation where in circumstances of a silence in a contract on a bargainable subject matter, and upon an evaluation of all ramifications of the parties' contractual agreement, and as appropriate, their conduct, it remains unclear and unascertainable with necessary assuredness whether the Union by its contractual agreement and/or conduct had waived its statutory right to be consulted on the particular unreferenced bargainable subject matter. To the contrary, it appears difficult to me upon a careful review of all the party agreed terms of this contract to envision any grounds (apart from the

sole absence of an actually expressed union abandonment of the extra-contract practice of bonus payments) for a viable claim to be advanced by the Union that it did not contractually waive its right to be consulted on the bonus payment practice. This is seen to be the case by virtue of its agreement that management would retain inter alia, a discretionary and exclusive right to continue (any) existing practice and policy, and the more so clearly shown in the context of the other provisions of this otherwise complete agreement. Thus as noted the present contract records a rather explicit agreement of the parties that denotes very clearly Hartman had successfully bargained for a retention, as its own discretionary and exclusive management right and function, the right

to continue practices and policies, of which the existing bonus payments by Hartman would appear necessarily to be regarded as one or the other. To conclude otherwise would seem to me to deny natural meaning to the very contract terms utilized by the parties and thus render their contract provision unavailable for specific application and thus meaningless to them. Waiver appears the more so unmistakably shown when that expressed management right agreement is analyzed in its combination with other contractual expressions (above noted) evidencing as clearly an intent on the part of the parties to arrive at a mutual agreement in delimitation of employee benefits to those set forth in the contract. Other contract provisions, while not individually controlling, are nonethe-

less further supportive of a contractual waiver, thus the effective zipper clause(s) fairly portray, by virtue of the mutual agreement reached thereon, a mutual intention on the part of the parties to consumate in this contract a full and self-contained complete expression of the bargain reached between them. The refined recitement of benefits (minor or otherwise) is in wholly compatible juxta position with the latter. Of similar connotation is the circumstance that the contract still otherwise records particular (mutually-agreed-upon) benefits as being applicable to certain unit employees and not others. At the same time omitted is reference to the (appreciable) bonus payment practice theretofore applicable to the route salesmen and not other unit employees. Furthermore, the

latter is omitted under circumstances (discussion during negotations) supporting a conclusion that the reference omission was consciously the act of the parties. Given that circumstance it can not be ignored that the very same contract also contains an affirmative provision portraying an equally clear party understanding and agreement that their contract supercedes other benefits given by either party theretofore. Again, the natural meaning of the contractual language utilized by the parties themselves would appear to be such as to unmistakably encompass the prior bonus payment (practice or policy) theretofore paid by Hartman whether the same may be distinguishedly viewed as a prior wage benefit, or other beneficial term or condition of employment. Finally, although

there may have been an incomplete discussion by the parties about bonuses during negotiations and the contract contains no explicit reference to bonus payments, there was in any event a contractual waiver by the Union of its right to be consulted on the matter of continuance of Hartman's practices and policies which clearly and unmistakably was known by the parties to include the specific practice or policy on bonus payments to route salesmen at the time that particular agreement was struck.[13]

The Board in Bancroft-Whitney noted that the discontinuance of the bonus

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13/ Compare Ador Corporation, 150 NLRB No. 1658, 1660; Consolidated Foods Corporation, 183 NLRB 832, 833; and International Shoe Co., 151 NLRB 693, 699.

payment to the unit employees without bargaining would be violative of Section 8(a)(5) unless in the circumstances described therein (noted above), the Union is deemed to have waived its right to require such bargaining. The Board found on the facts of Bancroft-Whitney that the Union had waived its right to bargain over the annual dividend. I find the Bancroft-Whitney case so similar in its essential facts and holdings as to be controlling and binding upon me in the disposition of the issue presented in this proceeding. Accordingly in view of all the above circumstances including the obvious full opportunity of the parties to negotiate mutually agreeable terms, the completeness of the resulting contract, the specificity of the particularly relevant contractual

provision noted and analyzed above, all of which warrant the finding I now make that the Union clearly and unmistakably waived its right to be consulted on the matter of Hartman's continuance of its past practice and/or policy of paying yearend or Christmas bonuses to its route salesmen.

It follows logically that if predecessor-Hartman by virtue of the Board's holding in Bancroft-Whitney Co., Inc., supra, could not be held bound to a continuance of its bonus-payment practice or policy which existed outside the contract, and would have been able to effect a discontinuance of same without any prior negotiation with the Union, then Respondent-Successor, which has assumed the same contract, and which, indeed, was

not even aware of any extra contract policy or practice of bonus payment to begin with, may not be deemed to have violated Section 8(a)(5) and (1) of the Act when, later in December 1977, Respondent-Successor told its route salesmen that it would not pay the yearend or Christmas bonus to them because it was not in the contract it had assumed. As I view the Board's holding in Bancroft-Whitney as being wholly dispositive of the present complaint allegations before me, I find it unnecessary under those circumstances to address other troublesome considerations bearing upon bargaining obligation effects, if any, stemming from the special circumstances that this Respondent was also a successor employer which at the time it purchased predecessor's assets and elected to employ

predecessor's work force, had assumed only the known union contract. Respondent had obviously hired the majority of the predecessor's employees on that basis (without evidenced fraud or illusion) and thus would appear logically to have set as its initial terms and conditions, those contained in the contract. 14 Consequently not addressed are seemingly weighty issues of whether any statutory 8(d) proscription consideration may be deemed to arise therefrom. 15 I have also given careful

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14/ For a learned discussion of the various practical considerations that a potential successor faces and evaluates initially. Cf.Doppelt, Successors Companies; the NLRB Limits the Options--and Raises Some Problems, 20 DePaul L.Rev. 176.

15/ Cf. N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272, 285-287, 294-295 (1972); H.K. Porter v. N.L.R.B. 397 U.S. 99, 102, 108 (1970); compare Virginia Sportswear, Incorporated, 226 NLRB 1296, 1303, and MPE, Incorporated, 226 NLRB 519, 521. In the latter case on somewhat (cont

consideration herein to the seemingly undisputed fact that employees, shortly after Respondent's takeover, were told by Respondent's principals that their pay and conditions would remain the same. However, at that time, it is also convincingly evident on this record that the Respondent successor was totally unaware of any extra-contract bonus payment and thus also unaware that its new employees might reasonably view its remarks as encompassing such. It would appear that such genuine

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15 (continued) similar facts connotating a successorship, but which facts in any event established that a new ownership and new management took over an enterprise while not aware that a new contract had been recently negotiated by the Union and prior management, the new management was held to be under no duty to sign or assume the already negotiated agreement as to which it had neither assented or had knowledge prior to its take over.

misunderstandings do not support a violation of the Act, cf. Southern Beverage Company, Inc., 171 NLRB 926, 929. Accordingly I shall recommend that the complaint herein be dismissed in its entirety.

Conclusions of Law

1. Pepsi-Cola Distributing Company of Knoxville, Tennessee, Inc., is an employer within the meaning of Section 2(6) and (7) of the Act; and is the successor of Hartman Beverage Company.

2. Respondent Successor in telling its employees in early December 1977 that it would not pay a yearend or Christmas bonus to its route salesmen without previously bargaining with the Union about it, did not thereby unilaterally change existing wages, hours and working terms or conditions of employment in violation

of Sections 8(a)(5) and (1) of the Act.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 16

ORDER

The complaint is dismissed in its entirety.

Dated, Washington,D.C. September 25, 1978.

/s/ Robert G. Romano
Administrative Law Judge

16/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Opposition

No. 81-1385

Supreme Court, U.S.
FILED
MAR 24 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

PEPSI-COLA DISTRIBUTING COMPANY OF KNOXVILLE, TENNESSEE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly concluded that the Union did not waive its statutory right to be consulted about changes in an established practice of paying a year-end bonus to route salesmen and that petitioner, therefore, violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by unilaterally discontinuing that practice.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-21) is reported at 646 F. 2d 1173. The decision and order of the Board (Pet. App. 22-109) are reported at 241 N.L.R.B. 869.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1981, and a petition for rehearing was denied on October 21, 1981. The petition for a writ of certiorari was filed on January 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), is set forth in pertinent part at pages 2-3 of

the petition. Another relevant provision of the Act, Section 8(d), 29 U.S.C. 158(d), provides in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *.

STATEMENT

1. Prior to February 1, 1977, Hartman Beverage Company sold carbonated beverages and syrup in the Knoxville, Tennessee, area. For approximately five to eight consecutive years prior to 1977, Hartman had paid each of its 65 to 70 route salesmen a year-end bonus calculated at the rate of one cent per case of product sold by the salesmen during the year. The bonuses were paid in late November or early December of each year (Pet. App. 27-28, 46-47).

In November 1975, following its certification as bargaining representative of Hartman's route salesmen, warehousemen and high lift operators, the Union[1] entered into its first one-year collective bargaining agreement with Hartman, for the period November 1975 to November 1976. At the time of the negotiations that resulted in the contract, the business agent representing the Union was unaware of Hartman's practice of paying a year-end bonus to its route salesmen, and there was no discussion of the bonus during the negotiations and no reference to the bonus in the resulting contract. Hartman nevertheless paid the traditional bonus to its route salesmen in late 1975 (Pet. App. 28-29, 49-50).

During negotiations for a second one-year contract in 1976, a Union committeeman inquired whether the year-

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[1] Teamsters Local Union No. 519, Knoxville and Vicinity, Tennessee.

end bonus was being accrued by withholding one cent per case from the commissions earned by the route salesmen during the year. Hartman's president replied that the bonus was not withheld from the salesmen's commissions, but stated that he would be happy to incorporate the one cent per case into the salesmen's commissions because it would be easier for bookkeeping purposes. He added, however, that making the payment as a year-end bonus was something he had done over the years because it was nice for the employees to receive it at Christmas time to help buy presents for their children. There was no further discussion of the bonus, and it was not referred to in the parties' second collective bargaining agreement, which was effective from November 27, 1976, to November 26, 1977. In late 1976, Hartman again paid its route salesmen the year-end bonus (Pet. App. 29-30, 50-54).

On February 1, 1977, petitioner purchased Hartman's business. During the negotiations leading up to the purchase no mention was made of Hartman's practice of paying a year-end bonus to the route salesmen, and petitioner had no actual knowledge of that practice as of the purchase date (Pet. App. 30, 34, 55, 63-67). Following the purchase, petitioner engaged in substantially the same business operation as Hartman had, employing the same supervisors and a majority of Hartman's former employees. Although it did not sign the 1976-1977 collective bargaining agreement between Hartman and the Union, petitioner recognized the Union as the employees' bargaining agent and honored the terms of that agreement (Pet. App. 30, 55-56).

In mid-February 1977, officials of both petitioner and Hartman held a meeting of the route salesmen, at which James Moore, petitioner's vice-president and general manager, told the salesmen that everything would be run as it had been by Hartman. In response to a question by a route salesman, petitioner's president, Larry Smith, assured the salesmen that there would be no change in the pay structure.

No specific reference to the year-end bonus was made at the meeting (Pet. App. 30-31, 70-71).

In May, Moore became aware for the first time of the bonus payment practice. Moore questioned a former Hartman payroll official, who stated that Hartman had paid the bonuses out of money accumulated by paying route salesmen one cent per case less than the contract rate. Petitioner did not consult with the Union, discuss the matter with the route salesmen, or take any other action to verify the information furnished by the former Hartman official (Pet. App. 31, 34, 72-73).

In late 1977, petitioner received inquiries from the route salesmen concerning when they would be paid their bonuses. At that time, Moore reviewed Hartman's payroll records and determined that Hartman actually had paid its route salesmen the year-end bonus in addition to the full contract rate (Pet. App. 32, 71, 74). Moore called a meeting of the route salesmen during the first week of December, at which he told the salesmen that petitioner had not known about the year-end bonus when it purchased the business from Hartman, that the bonus was not in the contract, that it was unfair, and that petitioner was not going to pay it (Pet. App. 32, 71-72). Petitioner did not notify or consult with the Union concerning its decision not to pay the bonus, and the route salesmen were not paid their traditional bonus in 1977 (Pet. App. 56-58).

2. The Board found that petitioner had violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing the established practice of paying a year-end bonus to the route salesmen without notifying or consulting with the Union (Pet. App. 35-36). In so holding, the Board rejected petitioner's contention (and the administrative law judge's finding (see Pet. App. 84-104)) that the Union had waived its statutory right to bargain about the bonus by agreeing to a contract that made no reference to the bonus and that

contained "zipper" clauses and a management rights clause (Pet. App. 23-27, 32-35).[2]

Applying the well-settled principle that waiver of a statutory bargaining right must be clear and unmistakable, the Board concluded that the circumstances surrounding the negotiation of the 1976-1977 contract between Hartman and the Union did not support a finding that the Union had waived its statutory right to be consulted about changes in the company's practice of paying a year-end bonus to its route salesmen (Pet. App. 27). Rather, in view of Hartman's payment of the bonus following the negotiation of contracts in 1975 and 1976 and the parties' discussion concerning the bonus during the 1976 negotiations, the Board found that Hartman and the Union had anticipated that the practice of paying the year-end bonus would continue. The Board found that nothing said in the negotiations put the Union

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[2]The relevant portions of these contract provisions are as follows (Pet. App. 24-25 n.2):

> Article XXI Management Rights
>
> *Section 2.* The exclusive functions and rights of management include, but are not restricted to the right . . . to establish or continue policies, practices and procedures . . . .
>
> Article XXXI Miscellaneous
>
> *Section 2.* The Employer and the Union agree that all matters desired by either party have been presented, discussed and incorporated herein or rejected. Accordingly, it is agreed that for the life of this Agreement each party voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter, whether or not referred to in this Agreement.
>
> * * * * *
>
> *Section 6.* This Agreement constitutes the complete understanding of the parties with respect to all issues between them and supersedes all written memoranda, agreement [*sic*] or benefits heretofore made or given by the parties, or either of them.

on notice that the failure to include in the collective bargaining agreement a provision dealing with the payment of the year-end bonus would preclude it from further bargaining on the subject (Pet. App. 32-33). Accordingly, the Board concluded that the Union had not clearly and unmistakably waived the right to bargain with respect to any change in the established practice of paying a year-end bonus to the route salesmen (Pet. App. 35).

Finally, the Board held that petitioner was not relieved of the bargaining obligation because it was a successor employer or because it had no knowledge of the bonus either at the time it purchased the Hartman enterprise or when it assured the employees that there would be no change in the pay structure. The Board based this holding on the fact that petitioner had learned of the bonus at least six months before it was scheduled to be paid but had failed to consult with the Union at that time or at any time prior to announcing directly to the employees its unilateral decision not to pay the bonus in 1977 (Pet. App. 34).

The Board ordered petitioner, *inter alia*, to bargain with the Union with respect to any change in the practice of paying the year-end bonus and to pay the route salesmen the 1977 bonus it had unlawfully withheld from them (Pet. App. 40).

3. The court of appeals upheld the Board's decision and enforced its order, with one judge dissenting (Pet. App. 3-21). The court agreed with the Board that the Union had not waived its statutory right to be consulted about any changes in the established practice of paying a year-end bonus to the route salesmen. The court characterized that practice as "a regularly calculated part of the route salesmen's compensation, based upon a formula of one cent per case" (Pet. App. 13), and noted that the "successor employer ha[d] promised to continue previously established compensation" (*ibid.*). In these circumstances, the court held, "a

general waiver clause, which does not refer specifically to waiver of a portion of the promised compensation, should not be regarded as a clear and unmistakable waiver of the union's right to collective bargaining" (*ibid.*).[3]

ARGUMENT

Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d), defines the duty to bargain collectively as "the mutual obligation * * * to * * * confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *." It is thus well settled that an employer violates Section 8(a)(5) and (1) of the Act by unilaterally altering existing terms and conditions of employment without affording the employees' bargaining representative a reasonable opportunity to negotiate about such changes. *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962). It is equally clear that a union's right to be consulted on such matters is a statutory right, which, absent waiver by the union, is not extinguished upon the execution of a collective bargaining agreement but "unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436 (1967). See also *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 425 (1967). Moreover, while a union may contractually relinquish such a statutory right as part of the bargaining process, "such a relinquishment must be in 'clear and unmistakable' language. * * * Silence in the bargaining agreement on such an issue does not meet this test." *Timken Roller Bearing Co.* v. *NLRB*, 325 F. 2d 746, 751 (6th Cir. 1963), cert. denied, 376 U.S. 971 (1964).

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[3]Contrary to this view of the court majority, the dissenting judge found "nothing in the surrounding circumstances that could be interpreted as a waiver of this waiver provision" (Pet. App. 18-19).

Petitioner does not dispute these basic principles. It contends, however, that the decision of the court of appeals, which upheld the Board's finding that the "zipper" clauses contained in the agreement between Hartman and the Union did not waive the Union's right to bargain with petitioner as a successor employer over any changes in the practice of paying year-end bonuses to route salesmen, conflicts with the decision of the Fourth Circuit in *NLRB* v. *Southern Materials Co.*, 447 F. 2d 15 (1971). The court below properly rejected this contention (Pet. App. 12-13).

In *Southern Materials*, the Fourth Circuit held that contractual language similar to that contained in the "zipper" clauses here constituted a "clear and unmistakable" waiver of the union's right during the term of the contract to bargain concerning Christmas bonuses, but remanded the case to the Board for a determination whether the circumstances surrounding the negotiations of the contract should relieve the union of its waiver (447 F. 2d at 16, 19).[4] As both the Board and the court of appeals found, such special circumstances are present here.[5]

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[4]The court noted (447 F. 2d at 19) that "questions remain of whether the union was fraudulently induced to agree to the waiver clause or whether the phrase 'hourly rate of pay' in the maintenance of standards clause constituted words of art sufficiently broad to include the regularly, previously paid Christmas bonuses." "These questions are raised," the court added (*ibid.*), "because of the evidence that the company led the union to believe that the company meant to maintain all present benefits and not just the hourly rates of pay * * *."

[5]*NLRB* v. *Auto Crane Company*, 536 F. 2d 310 (10th Cir. 1976), also relied on by petitioner (Pet. 13), similarly is factually distinguishable from the present case. In *Auto Crane*, the court of appeals held that a union, by agreeing to a contract containing a "zipper" clause similar to that involved here, waived its right to bargain with respect to a wage increase and thrift plan unilaterally implemented by the employer. However, in *Auto Crane*, unlike the present case, there was no evidence of a bargaining history indicating the parties' understanding concerning the terms and conditions of employment that the employer subsequently unilaterally altered.

The record establishes that the Union and the predecessor employer, Hartman, had discussed the bonus issue during their most recent contract negotiations and had reached an understanding that the bonuses would continue to be paid in accordance with established practice (Pet. App. 29-30, 32-34, 50-54; A. 87-90).[6] Because the year-end bonuses thus constituted a basic portion of the route salesmen's compensation that the parties anticipated would continue,[7] the Board reasonably concluded that the "zipper" clauses of the collective agreement were not intended to waive the Union's right to bargain over changes in the payment of the bonus. Petitioner, as a successor employer who had assured the employees that their compensation would remain the same, stood in the shoes of Hartman, and likewise was not free to unilaterally discontinue payment of the bonus.

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[6]"A." refers to the appendix filed in the court of appeals.

[7]The record shows that the bonuses involved here, which were calculated at a rate of one cent per case of product sold (A. 97), could amount to as much as $600 per year (A. 73) and were subject to the usual withholding for taxes and other deductions (A. 95). In addition, if an employee resigned before the full bonus was due to be paid, the employee nevertheless was paid an amount based on the number of cases he had sold between the payment of the previous bonus and his separation date (A. 97). By contrast, the bonuses in *Southern Materials*, as the court below pointed out, "were small and consistent with being Christmas gifts, as opposed to part of regular compensation" (Pet. App. 12).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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